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HON. JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON TOXICS COALITION, NORTHWEST COALITION FOR ALTERNATIVES TO PESTICIDES, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, and INSTITUTE FOR FISHERIES RESOURCES, Plaintiffs, vs. ENVIRONMENTAL PROTECTION AGENCY, and MIKE LEAVITT Defendants. vs. AMERICAN CROP PROTECTION ASSOC. et al Intervenor-Defendants	Case No. C01-0132 **FEDERAL DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED INJUNCTIVE ORDER**

At the December 9, 2003 status conference, the Court directed the defendants to file these objections to the plaintiffs' proposed injunctive order which plaintiffs were to revise in light of the Court's statements during the status conference. The defendants hereby file their objections.

1. The plaintiffs did not adopt the defendants' language for "Salmon Supporting Waters" as directed by the Court. The Court indicated at the hearing that the plaintiffs should use the definition as supplied by the defendants. Transcript of December 9, 2003 ("Trans.") at 7. The plaintiffs modified the language in their proposed order in such a way that it is unclear that Salmon Supporting waters are meant to be the intersection of streams on Streamnet (for Washington & Oregon) or in the USGS National Hydrography Data Set (for California) with the defined geographic areas of critical habitat. The language used by the plaintiffs does not make this intersection clear in the way that the defendants' proposal did. Accordingly the Court should use the language provided on pages 3-4 of defendants' proposed order together with the Court's additional instructions regarding the inclusion of estuaries in critical habitat and the use of the ordinary high water mark as the boundary for "Salmon Supporting Waters." Defendants note that instructions regarding the ordinary (generally described as the "mean") high water mark may be more appropriate and useful in section III of the Order in establishing use buffers.

2. The plaintiffs' statements regarding noxious weed control is not supported by any record before this Court. The plaintiffs' order states at page 9 that the Court is requiring noxious weed control programs to meet certain requirements "that NMFS routinely requires for such programs." Such a statement by the Court is error. There is nothing in the administrative record before the Court or the parties' arguments and discovery that demonstrate that NMFS routinely requires these measures. This would be a new, unsupported finding by the Court, and would be error.

3. The plaintiffs did not follow the Court's direction in redrafting the urban use restrictions, and the Court's mandating the exact content of a regulatory agency's communication with the regulated community and the public is error. The plaintiffs have

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completely ignored the Court's direction that it would use EPA's proposal for the distribution of the urban use educational material, but the content for that material would be supplied by the plaintiffs. The Court stated: "Here's what we're going to do: We're going to use the EPA proposal regarding the point of sale notice, and with language as proposed by the plaintiffs in that point of sale notification." Transcript at 13. The plaintiffs did not modify their order to incorporate the defendants' proposal for point of sale distribution of the material. The defendants' proposal was:

> Within 60 days of the effective date of this Order, the EPA will make the educational information available to the general public both on its web-site and in suitable concise paper form. For the website based educational information, EPA will provide the web-site address to State pesticide agencies, state fish agencies and land grant university extension coordinators in Urban Areas in Washington, Oregon and California and will request that these entities link to it from their own web-sites.
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> For the concise paper based educational information, the Intervenor defendants will produce this concise educational information in paper form, from electronic media provided by EPA. The Intervenor defendants will distribute it in quantity, for point of sale distribution, to major retail sales outlets where lawn and garden products are sold in Urban Areas in Washington, Oregon and California, within 90 days of the effective date of this Order. Within 60 days of this order, EPA will produce and provide copies to State pesticide agencies, state fish agencies and land grant university extension coordinators in Urban Areas in Washington, Oregon and California, and will request they provide this information to Certified Applicators certified in any category that would permit the applicator to apply pesticides in Urban Area parks, golf courses, and housing areas.

Federal Defendants' Proposed Order at 7-8. Instead of complying with the Court's direction, the plaintiffs attempt to place additional burdens upon EPA in their order. The plaintiffs' order requires EPA to "ensure that the mandatory point of sale notifications are made available . . . so that the purchaser is either made aware of or receives a copy . . . prior to the purchase." ~~Plaintiffs~~ Plaintiffs' proposed order at 12. That was not EPA's proposal, and that is a burden and a responsibility that EPA can not possibly meet. EPA can not "ensure" the conduct of retail outlets. EPA can produce material, it can provide that material, and it can request that the material be provided with and made available with certain products. However, EPA has no ability or mechanism to "ensure," as the plaintiffs seek, that the purchaser actually receives it.

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There is, or course, no reason for the Court to believe that retail outlets would not actually follow EPA's direction, but it is impossible for EPA to comply with the Court's order as plaintiffs have drafted it. Further, EPA's ability to legally compel pesticide registrants and retailers to distribute the materials is limited to its authority under FIFRA. In order to compel label changes or changes to the terms and conditions of registration, EPA must take either enforcement or regulatory action using the procedures of FIFRA, such as cancellation or suspension under FIFRA §6(b) and (c). 7 U.S.C. §136d(b), (c). Plaintiffs' discussion at the December 9 status conference of *Chemical Specialities Manufacturers Association, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992) is therefore inapposite, since EPA does not possess the authority to require point of sale notifications through any other process irrespective of whether such materials may or may not constitute labeling under FIFRA §2(p). And as the Court emphasized in its August 8 order, it is not ordering EPA to take action under FIFRA. August 8, 2003 Order at 21. The Court should reject plaintiffs' proposed language, since it does not comport with the Court's direction to use the EPA's proposal or with the Court's August 8 order, and since it imposes impossible standards upon EPA.

A. The urban use remedy in plaintiffs proposed order mandates affirmative non-ministerial action by EPA and is therefore unlawful.

The defendants' also object to the Court's ordering EPA to adopt the exact graphical design and verbatim content for material that is to be distributed as an EPA document. The order the Court is contemplating for the urban use pesticides is a mandatory injunction that would require EPA to take an affirmative act (issue a public document) and would dictate the exact content of that document. "When the effect of a mandatory injunction is the equivalent of mandamus, it is governed by the same standards." *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9th Cir. 1995); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir. 1986). When reviewing the appropriateness of an injunction to prevent interim harm from a Endangered Species Act violation, the Ninth Circuit applied both the principles of mandamus and traditional

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injunctive standards. *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832-33 (9th Cir. 2002).

In this case the action to be ordered by the Court is neither ministerial nor plainly prescribed by law, and therefore should not be compelled. According to the Ninth Circuit, a court may only compel an officer of the United States to perform a duty if (1) the plaintiff's claim is clear and certain; (2) the duty of the officer "is ministerial and so plainly prescribed as to be free from doubt," and (3) no other adequate remedy is available. *R.T. Vanderbuilt Co. v. Babbitt,* 113 F.3d 1061, 1065 n. 5 (9th Cir. 1997); *Fallini,* 783 F.2d at 1345. The creation of the educational material and its distribution for use as a point-of-sale material is not a ministerial act by EPA. Likewise, such activity is not prescribed, directed, or required of EPA by any law or regulation. Accordingly, because it does not satisfy the Ninth Circuit test for affirmative injunctive relief, the Court should not order EPA to take such action.

B. Even if the court may order EPA to take such an affirmative act, ordering EPA to adopt as its own the exact language and graphics supplied by the plaintiffs impermissibly directs federal agency discretion.

More importantly, even if an affirmative activity satisfies the mandamus test, while a court may use its power to compel action that involves the exercise of discretion by a federal agency, it may not direct the outcome of the exercise of that discretion. *Miguel v. McCarl*, 291 U.S. 442, 451 (1934) (court has authority to "compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion.") (emphasis supplied); *See Idaho Watersheds*, 307 F.3d at 822 (since the court did not direct the exercise of agency discretion or judgment, interim relief order was appropriate). Directing the exact language and graphics that EPA must adopt as its own, in its own publication, is an abuse of the Court's discretion to fashion affirmative injunctive relief. Were EPA volunteering to take an

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action, like the Bureau of Land Management was in *Idaho Watersheds*, 307 F.3d at 832, and the Court was merely adopting what EPA was willing to do, such an order may pass scrutiny. *Id.* However, significantly, in the instant matter, EPA is neither voluntarily suggesting nor agreeing to the language or the graphics that plaintiffs would have this Court adopt.[1]/

If the Court were to order this type of affirmative injunction over EPA's objection it should not also err by impermissibly directing the exercise of EPA's discretion as the plaintiffs urge it to do. The language provided by EPA in its form of the injunctive order as ordered by the Court directed the content of the publication in broad terms, but did not impermissibly curtail the regulatory agencies discretion. Unless the Court adopts that or similar language for its order, the Court errs by allowing the plaintiffs to dictate the precise content of an EPA document.

C. Allowing the plaintiffs to dictate the language and graphics employed by EPA as its own also runs afoul of traditional injunctive relief standards.

The urban use remedy supplied by the plaintiffs also fails under a traditional balancing of the equities for injunctive relief because there is no evidence that mandating the exact language and graphics to be employed by the EPA is necessary to correct the identified harm. The basic principles of equitable relief require that the relief should be tailored no more broadly than needed to address or correct the identified injury or harm. There is no evidence that it is necessary for the Court to allow the plaintiffs to pick the precise language that EPA must adopt as its own in order to educate urban users of the unique or particular conditions of the urban environment affects the risks to salmon by urban residents use of pesticide products. The

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[1]/ Nor is EPA voluntarily or willingly proposing this type of relief to the Court. Only at the Court's direction has EPA provided the Court with language appropriate for such an affirmative injunction, if it satisfied the mandamus requirements.

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language supplied by EPA to the Court would set the parameters for the EPA's communication with the regulated community and public, but would leave to EPA the discretion to determine the most accurate and appropriate form of that message.

Absent some demonstration that it is necessary for the plaintiffs to dictate what language EPA must adopt as its own to prevent the identified harm, the Court should not needlessly curtail EPA discretion.[2]/ Such an injunction would be broader than is needed to provide relief adequate for the injury alleged. Accordingly, the Court should not prescribe the precise language and graphics advocated by the plaintiffs.

4. The defendants object to the language for terminating events because they do not accurately reflect the ESA or regulations, and are therefore ambiguous. The proposed order incorrectly references the ESA for the first terminating event. Biological Opinions by NMFS are not issued pursuant to ESA § 7(a)(2), but rather pursuant to ESA §7 (b)(3) and NMFS regulations. In addition, the plaintiffs removed the issuance of a concurrence by NMFS as a termination event in circumstances involving formal consultation with NMFS. While concurrence by NMFS is ordinarily given when the agency has made a Not Likely to Adversely Affect ("NLAA") finding in connection with informal consultation, even if an agency such as EPA does not make an NLAA finding and therefore initiates formal consultation, NMFS may later determine that the action is an NLAA action, and then issue a concurrence, and not a full

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[2]/ Such an order also needlessly potentially infringes upon the powers reserved to the executive by Article II of the Const. U.S. Const. Art. II Sect 1. In Gray Panthers v. Heckler, 1986 WL 110679 (D.D.C., Feb 14, 1986), the court noted further that the D.C. Court of Appeals "has strongly cautioned against taking an approach that would have federal courts act as monitors of the wisdom and soundness of executive action." Id. (citing Women's Equity Action League v. Bell, 743 F.2d 42, 43 (D.C.Cir.1984)).

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biological opinion. 40 CFR §402.14(l)(3). The wording of the plaintiffs' relief would foreclose this NMFS regulatory procedure. Accordingly, the first terminating event should be "The issuance by NMFS of a biological opinion or concurring opinion which addresses a Pesticide and a Salmon ESU subject to this injunction."

For the second terminating event, the plaintiffs have added a condition that the Court has not indicated it intended to impose. In addition, the condition "affirmatively failed to concur" is ambiguous because it does not comport with actions that NMFS may take under regulations. Accordingly, the second termination event should state "A finding by EPA made for ESA Section 7 compliance purposes that the Pesticide is "not likely to adversely affect" the particular Salmon ESU."

5. The defendants object to the plaintiffs' "enjoining" language because it appears to require EPA to take an affirmative act under FIFRA to reinstate enjoined pesticide uses. Plaintiffs' proposal at page 4 provides that "EPA shall not re-authorize such use or application until this order is terminated . . . ." Contrary to plaintiffs' proposal, nothing in the Court's earlier orders suggests that EPA must take a registration action under FIFRA to reinstate enjoined pesticide uses once the injunction terminates. Accordingly, the order should read "This injunction shall not be lifted until this order is terminated, in whole or in part, as provided in Section VI or by other order of the Court. "

6. Certain language used by plaintiffs for buffer variations and exclusions will be unclear or confusing to pesticide users and the public. Defendants acknowledge the Court's December 9 direction regarding plaintiffs' proposed buffer variations and exclusions. Some of those provisions, however, as drafted by plaintiffs, will be unclear and confusing to users and

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therefore should be rewritten or amended as follows:

A. Section III.B.6.

Plaintiffs inclusion of the 100 yard aerial buffer and 20 yard ground buffer for other carbofuran uses in this section is unnecessary and confusing in this section since those buffers are already established by section III.A. of the order. Accordingly, section III.B.6 should be rewritten to state:

"6. EPA's authorization of carbofuran on pine seedlings by dipping the seedling roots in a one-percent slurry containing the active ingredient is ENJOINED, VACATED, and SET ASIDE within one yard of Salmon Supporting Waters in California, Oregon, and Washington."

B. Section III.B.7. and **Section III.B.9.**

Defendants object to plaintiffs' proposed language in III.B.7 and III.B.9. because (1) both provisions as drafted fail to make clear the probable intent that use between 20 yards and 1 yard of "Salmon Supporting Waters" is not enjoined provided such use is limited to 10 percent of the area treated; (2) it is unclear to users what the basis would be for determining 10 percent of treated areas, such as "forestry sites"; and (3) it is not clear that the provisions regarding rights-of-way, etc., in section III.B.9 are intended for or relevant to treatment of wasp and hornet nests.

C. Section III.C.

The proposed language below adds the terms "enjoined" and "vacated" to the first sentence of section III.C. to clarify that no aspect of the injunction applies to the specific pesticide product or use exclusions in section III.C.

" . . .the Court determines that EPA's authorization of the pesticide uses specified below "are not enjoined, vacated or set aside."

D. section III.C.10.

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The Food and Drug Administration authorizes the use of pharmaceuticals, not EPA. Accordingly, the pharmaceutical use of products containing lindane are not the subject of this litigation and need not and should not be referenced in the Court's order. Reference to such uses in the order may confuse the public about the applicability of the order to other non-pesticidal uses of chemicals that are not authorized by EPA under FIFRA.

7. Plaintiffs' Exhibit 2 excludes one of EPA's "Not Likely to Adversely Affect" (NLAA) determinations. Plaintiffs' exhibit 2 "Pesticides With Not Likely to Adversely Affect Determinations for a Subset of Evolutionary (sic) Significant Units (shaded)" is inaccurate and should be amended to include EPA's NLAA determination for the Ozette Lake Sockeye Salmon for diuron non-crop uses. Federal Defendants' Notice of Filing Form of Injunctive Order, Table C.

8. The defendants incorporate by reference their arguments against the language supplied by plaintiffs that defendants made in their Notice of Filing Form of Injunctive Order, previously filed with the Court. The objections and concerns to numerous other word choices and the form of the order proposed by plaintiffs have been raised in the defendants Notice of Filing Form of Injunctive Order, previously filed with the Court. Rather than repeat those objections and arguments again, the defendants refer the Court to this earlier filing and incorporate those arguments.

Respectfully submitted,

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